STATE OF MICHIGAN

COURT OF APPEALS

BLANCHE HUDSON and PAT FOSTER, Plaintiffs-Appellants, v JOHN C. KLEUESSENDORF and JOHN T. BENSON, Defendants-Appellees.	UNPUBLISHED September 19, 2017 No. 333124 Allegan Circuit Court LC No. 13-052422-NZ

Before: TALBOT, C.J., and O'CONNELL and CAMERON, JJ.

PER CURIAM.

Plaintiffs, Blanche Hudson and Pat Foster, appeal as of right the trial court's May 3, 2016 order awarding defendants, John C. Kleuessendorf and John T. Benson, $5,009.65 in costs and $38,827.67 in attorney fees. Because the trial court utilized the wrong legal framework, we vacate the order and remand for further proceedings.

I. FACTUAL BACKGROUND

This appeal arises out of a dispute over a private road, a property line, and improvements to land. Foster's property is located on Mallard Street, a private road, and is part of Recreation Development Subdivision No. 1 ("the subdivision"). Hudson and defendants are neighbors on Mallard Street across from Foster, but their properties are not part of the subdivision. The parties' properties are only accessible through Mallard Street, which connects to Blue Goose Avenue—another private road. Defendants landscaped their yard by filling in a ditch, erecting a small fence along Mallard Street, and planting trees behind the fence. Thereafter, plaintiffs filed their complaint, claiming (1) defendants were not allowed to access Mallard Street because it was a private road, and (2) defendants were liable for negligence, trespass, encroachment, and nuisance due to their landscaping. Plaintiffs alleged that defendants' fence was built on Mallard Street—not their own property—and by filling in the ditch, defendants caused consistent

flooding on Foster's property. The trial court granted summary disposition under MCR 2.116(C)(10) in favor of defendants, and Foster alone appealed that decision.[1]

After Foster filed the appeal, defendants filed a motion for costs and attorney's fees in the trial court under MCR 2.625 and MCL 600.2591. Defendants asserted that plaintiffs' claims were factually and legally frivolous and designed to harass defendants. As a remedy, defendants sought $7,034.35 in costs and $58,212.40 in attorney's fees. The trial court granted the motion and awarded defendants "66.7% of the total costs," which "reflects the [c]ourt's determination that two thirds of [d]efendant's total costs in the overall case were reasonably incurred in investigating and litigating those portions of [p]laintiff's [sic] case which were factually frivolous or calculated to harass and embarrass [d]efendants." Plaintiffs appealed the trial court's order.

II. STANDARD OF REVIEW

"This Court reviews a trial court's ruling on a motion for costs and attorney fees for an abuse of discretion." *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Radeljak v Daimlerchrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016). "A trial court's findings of fact, such as whether a party's position was frivolous, may not be set aside unless they are clearly erroneous." *Keinz*, 290 Mich App at 141. A "trial court's decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed." *Holton v Ward*, 303 Mich App 718, 734 n 20; 847 NW2d 1 (2014) (quotation marks and citation omitted). Further, to the extent that review of the issue entails the interpretation of a court rule or a statute, "this Court reviews the issue de novo." *Id*.

III. ANALYSIS

Plaintiffs argue that the trial court erred in entering the order regarding costs and attorney fees under MCR 2.625 and MCL 600.2591.[2] We agree.

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[1] This Court affirmed the trial court's order granting defendants' motion for summary disposition. See *Hudson v Kleussendorf*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2016 (Docket No. 327878), p 5.

[2] Plaintiffs set forth a host of other arguments on appeal—none of which are entirely clear. To the extent that plaintiffs raise issues outside of the issue raised in their statement of the questions presented, these issues are not properly before this Court, and we decline to address them. See *Harper Woods Retirees Ass'n v Harper Woods*, 312 Mich App 500, 515; 879 NW2d 897 (2015) ("Issues not specifically raised in an appellant's statement of questions presented are not properly presented to this Court."). Moreover, these issues are cursory and undeveloped, and they are deemed abandoned. See *Wayne Co Employees Retirement Sys v Wayne Charter Co*,

"In general, a party is not entitled to an award of attorney fees and costs unless such an award is expressly authorized by statute or court rule." *Kennedy v Robert Lee Auto Sales*, 313 Mich App 277, 285-286; 882 NW2d 563 (2015). MCR 2.625 provides the following rule regarding the right to costs:

> **(A) Right to Costs.**
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> (1) *In General.* Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.
>
> (2) *Frivolous Claims and Defenses.* In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.

In turn, MCL 600.2591 provides that the trial court shall award costs and fees when a civil action or defense was frivolous:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

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497 Mich 36, 41; 859 NW2d 678 (2014). Finally, to the extent that plaintiffs' reply brief on appeal sets forth two entirely new issues presented, these issues are not properly before this Court; thus, we do not address them. See *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 199; 826 NW2d 197 (2012) ("Raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal.").

(iii) The party's legal position was devoid of arguable legal merit.

(b) "Prevailing party" means a party who wins on the entire record.

"To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made," and "[t]he factual determination by the trial court depends on the particular facts and circumstances of the claim involved." *In re Costs & Attorney Fees*, 250 Mich App 89, 94-95; 645 NW2d 697 (2002). See also *Louya v William Beaumont Hosp*, 190 Mich App 151, 162; 475 NW2d 434 (1991) ("To determine whether sanctions are appropriate under MCL 600.2591; MSA 27A.2591, it is necessary to determine whether there was a reasonable basis to believe that the facts supporting the claim were true *at the time the lawsuit was filed* . . . ."). "That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry." *Jerico Const, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). In other words, "[t]here is a significant difference between bringing a lawsuit with no basis in law or fact at the outset and failing to present sufficient evidence to justify relief at trial." *Louya*, 190 Mich App at 162.

Under MCL 600.2591(3)(a), a civil action can be frivolous in three ways. With respect to the first definition of frivolous, MCL 600.2591(3)(a)(i) requires that "[t]he party's primary purpose *in initiating the action* or asserting the defense was to harass, embarrass, or injure the prevailing party." (Emphasis added). Thus, even if certain conduct during the litigation is designed to harass, embarrass, or injure, an action is not "frivolous" under the meaning of MCL 600.2591(3)(a)(i) unless the "primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party." MCL 600.2591(3)(a)(i).[3] The dictionary defines "initiate" as "to cause or facilitate the beginning of[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). See also *Salem Springs, LLC v Salem Twp*, 312 Mich App 210, 218; 880 NW2d 793 (2015) ("Because the phrase is undefined, we accord the words of the statute their plain and ordinary meaning and may consult a dictionary to ascertain that plain meaning.").

With respect to the second and third definitions of frivolous, MCL 600.2591(3)(a)(ii) requires a finding that "[t]he party had no reasonable basis to believe that the facts underlying

[3] There are other avenues for relief when a party's conduct during litigation is designed to harass, embarrass, or injure. See, e.g., MCR 2.114(E) (providing sanctions for documents signed by a party and interposed for an improper purpose); MCR 2.302(G) (providing sanctions for improper conduct during discovery). On various occasions, panels of this Court have acknowledged the difference in the applicability of MCR 2.114 and MCL 600.2591. See, e.g., *Home-Owners Ins Co v Andriacchi*, ___ Mich App ___, ___ n 9; ___ NW2d ___ (2017) (Docket Nos. 331260; 332457; 333695; 332640); slip op at 14 n 9 ("Again, the issue is being analyzed under MCR 2.114(E) alone. MCL 600.2591 is not applicable to a frivolous motion because a motion does not involve a claim or defense in a civil action."); *Maryland Cas Co v Allen*, 221 Mich App 26, 30; 561 NW2d 103 (1997) ("While MCR 2.114 covers sanctions for filing frivolous documents, MCL 600.2591; MSA 27A.2591 covers sanctions for the filing of frivolous actions or defenses.").

that party's legal position were in fact true," and MCL 600.2591(3)(a)(iii) requires a finding that "[t]he party's legal position was devoid of arguable legal merit." This Court has long held that "it is necessary to evaluate the claims or defenses at issue at the time they were made." *In re Costs & Attorney Fees*, 250 Mich App at 95-96 (concluding that the defense was both factually and legally frivolous because the facts underlying the legal position were not true at the time they were made and the argument was devoid of legal merit).

After a review of the trial court's order, it is unclear as to what findings, if any, were based on actions that occurred "at the time the lawsuit was filed." *Louya*, 190 Mich App at 162. The trial court concluded that plaintiffs' claims were frivolous under all three statutory definitions. However, its findings, at least in part, focused on whether plaintiffs' actions during the course of the litigation were frivolous, rather than focusing on the claims at the time they were made. By focusing on the incorrect time period, the trial court did not analyze MCL 600.2591 in the proper legal framework.[4]

First, the trial court failed to analyze MCL 600.2591(3)(a)(i) in the context of plaintiffs' "primary purpose in *initiating* the action." The trial court partially relied on Foster's 2011 videotaped statements to hold that the claims were meant to harass, embarrass, and financially injure defendants, but the trial court ultimately concluded that the video tape was not an indicator that plaintiffs' claims were frivolous. The only other evidence of harassment that was included in the trial court's order was based on actions that took place after the claims were brought. In fact, the trial court stated, "[A] pattern of frivolous actions by [p]laintiffs did not emerge until after their attorney withdrew in early 2015." We acknowledge that a party's litigation conduct can be evidence to support that the primary purpose of initiating claims was to harass, embarrass, or injure. See *Dep't of Natural Resources v Bayshore Assoc, Inc*, 210 Mich App 71, 89; 533 NW2d 593 (1995) (holding that, even if there was a genuine issue concerning an aspect of the litigation, sanctions were proper under MCL 600.2591 and MCR 2.114 because "the [plaintiff's] actions show that its primary purpose in initiating and continuing this action was to harass, embarrass, or injure [the defendant]"). However, the relevant inquiry under MCL 600.2591(3)(a)(i) remains whether the "primary purpose in initiating the action . . . was to harass, embarrass, or injure the prevailing party," rather than whether the primary purpose in taking certain actions during litigation was to harass, embarrass, or injure. As previously noted, there are other remedies for when motions or discovery actions are frivolous. On remand, the trial

[4] We note that this Court has held that a plaintiff's claim, although not frivolous at the outset, was factually frivolous after discovery and "by the time [the defendant's] motion for summary disposition had been granted." See *Fonstad v Teal*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2005 (Docket No. 254051), p 6. Notwithstanding this Court's longstanding precedent that costs under MCL 600.2591 must be evaluated at the time the claims are filed, arguably the plain language under MCL 600.2501(3)(a)(ii) and (3)(a)(iii) does not mandate such a requirement. However, we are bound by this Court's longstanding precedent, MCL 7.215(C)(2), and the proper inquiry remains whether the claims were frivolous at the time they were filed. *Louya*, 190 Mich App at 162.

court should evaluate whether plaintiffs' primary purpose in *initiating* the action was to harass, embarrass, or injure defendants.[5]

Second, the trial court also failed to analyze MCL 600.2591(3)(a)(ii) in the proper timeframe (i.e., whether, *at the time of filing the action*, plaintiffs had a reasonable basis to believe that the facts underlying their legal position were true). According to the trial court, plaintiffs' claims were factually frivolous because both surveys of the property proved that defendants' fence was within their boundary line, and any flooding on Foster's property was not a result of filling in the ditch with dirt. The record, and the trial court's order, is unclear whether plaintiffs' claims were factually frivolous from the outset. It is unclear how the application of this legal standard would impact the trial court's findings, and remand is appropriate for proper consideration of the issue.[6]

Although we need not address plaintiffs' arguments regarding the amount of costs and fees because we vacate the order, we note the relevant text of MCL 600.2591(2) and case law regarding the amount of costs and fees. "The relevant case law states only that the award be 'reasonable.' " *In re Costs & Attorney Fees*, 250 Mich App at 104. Once the trial court clarifies its findings as to the extent plaintiffs' claims were frivolous, it should then clarify what fees, if any, were reasonable.

We vacate and remand this case to the trial court for reconsideration of its decision in light of this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Thomas C. Cameron

[5] The trial court's analysis under MCL 600.2591(3)(a)(ii), i.e., whether plaintiffs' claims were factually frivolous at the time of filing, may affect this inquiry.

[6] The trial court concluded that plaintiffs' first claim, i.e., that defendants could not access Mallard Street, was devoid of legal merit and was, therefore, frivolous under MCL 600.2591(3)(a)(iii). However, the trial court concluded that this claim did not cause discernable costs, and defendants were not entitled to costs or attorney fees for bringing that frivolous claim.